Volume 72
Issue 3 *Dickinson Law Review - Volume 72, 1967-1968*

3-1-1968

Recent Cases

LABOR LAW—NATIONAL LABOR RELATIONS BOARD—EXCLUSIVE JURISDICTION OF LABOR DISPUTE

Stryjewski v. Brewery Drivers Local 830, 426 Pa. 512, 233 A.2d 264 (1967).

On January 10, 1967, a Teamsters union affiliate[1] began peaceful picketing of the Stryjewskis' retail beer distributing company.[2] The union's alleged purposes were to publicize that the company was non-union and to organize the employees.[3] The Stryjewskis' instituted an action in equity in the Philadelphia Court of Common Pleas seeking both monetary damages and an injunction to terminate the picketing. After a hearing the court refused to issue a preliminary injunction on the grounds that under the pertinent provisions of the National Labor Relations Act[4] the matter was *arguably* within the exclusive jurisdiction of the National Labor Relations Board.[5] The Supreme Court of Pennsylvania in *Stryjewski v. Brewery Drivers Local 830*[6] affirmed.[7] The court held that until the United States Supreme Court has spoken directly on the subject or pending an actual declination to act by the NLRB, a state court should not assume jurisdiction.

The court's reluctance to take jurisdiction was the result of NLRB policy[8] and the landmark *Guss v. Utah Labor Relations*

1. Local Union 830, Brewery & Beer Distributor Drivers, Helpers & Platform Men.

2. The Stryjewski company, Tacony Beer Distributing Company, is a "D Distributor." The Union has a collective bargaining agreement with other distributors who import the beer from outside the state and sell to so-called "D Distributors" like the Stryjewskis. These D Distributors then resell at either retail or wholesale, but not to other distributors. The importing distributors collective bargaining agreement requires that the D Distributors may not *pick up* beer but that all beer supplied to them must be delivered. Thus, picketing of the D Distributors effectively cuts off their beer supplies since the importer's union employees will not cross the picket line to make deliveries. Stryjewski v. Brewery Drivers Local 830, 426 Pa. 512, 519, 233 A.2d 264, 265 (1967).

3. 426 Pa. at 514, 233 A.2d at 265 (testimony of the president and business agent of the union).

4. National Labor Relations Act, 29 U.S.C. §§ 151-168 (1965).

5. Hereinafter called NLRB or Board.

6. 426 Pa. 512, 233 A.2d 264 (1967).

7. *Id.* at 519, 233 A.2d at 268. This was a 4-2 decision.

8. For the first 15 years of its existence, the Board determined when not to exercise jurisdiction on a case-by-case basis. In 1950, the Board began to utilize varying sets of jurisdictional standards to aid it in making such determinations. *See* Siemons Mailing Service, 122 NLRB 81, 82 (1958) (non-retail business); Carolina Supplies and Cement Co., 122 NLRB 88 (1958) (retail business); HPO Service, Inc., 122 NLRB 394 (1958) (transporting in interstate commerce).

Board[9] decision which has produced a state-federal "no-man's-land" in labor relations proceedings.[10] To cure this vacuum, the *Guss* court felt legislative, not judicial, action was required. Congress, in what proved to be an ineffective attempt to eradicate this jurisdictional void added section 164(c) to the NLRA by the Labor-Management Reporting and Disclosure Act of 1959.[11] This section provides in part:

> (c)(1) The Board, in its discretion, may by rule or decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.[12]

Thus, the statutorily imposed rule is that in labor disputes[13] in which the Board declines to act, the states are free to assert jurisdiction.

The Supreme Court has yet to render an opinion in which it has interpreted the word "decline." Certain guidelines, however, are available to the states for determining when they may act. Before Congress enacted section 164(c), *San Diego Bldg. Trades Council v. Garmon*[14] established the rule that for those cases *arguably subject to* section 7 and section 8 of the NLRA, the Board has exclusive jurisdiction.[15] The *Garmon* exclusive jurisdiction rule,

9. 357 U.S. 1, (1957). *See also*, Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957).

10. The phrase appeared first in Senate Report No. 187, April 14, 1959, as reported in 1959-2, U.S. CODE CONG. & AD. NEWS, 2318, 2341. For a fuller discussion of this problem see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086 (1960); Goldberg and Meiklejohn, *Title VII: Taft-Hartley Amendments with Emphasis on the Legislative History*, 54 NW. U.L. REV. 747 (1960); Hanley, *Federal-State Jurisdiction in Labor's No Man's Land*: 1960, 48 GEO. L.J. 709 (1960).

11. This legislation is also known as the Landrum-Griffin Act, 29 U.S.C. § 164 (1964).

12. *Id.* § 164(c).

13. This term has been held to include the demands of a union to unionize a plant in which it has no members. *E.g.*, Lauf v. Shinner & Co., Inc., 303 U.S. 323 (1938); NLRB v. Mackey Radio & Telegraph Co., 304 U.S. 333 (1938).

14. 359 U.S. 236 (1959).

15. When an activity is *arguably subject* to sections 7 or 8 of the Act,

although of questionable value in this argumentative age, is used by some courts as a basis for refusing to assert jurisdiction in picketing-for-recognition disputes.[16]

Section 164(c) allows the Board "by rule of decision or by published rules" to decline to act in labor disputes involving classes or categories of employers. The "published rules" language has been interpreted by the NLRB to refer to its previously enunciated jurisdictional yardsticks.[17] In *Carolina Supplies and Cement Co.*[18] the Board set forth its yardstick in labor disputes involving retail businesses. It held that it would assert jurisdiction only over labor disputes involving retail businesses which fall within its statutory jurisdiction and which have a gross volume of business of at least $500,000 annually.[19] Assuming that the activity is not arguably subject to its statutory provisions and that in a retail concern the gross volume of business falls below the $500,000 minimum gross volume, must the NLRB *actually* decline jurisdiction in *each* case, or may it prospectively decline over an entire *class* of labor disputes? In construing the language of Section 164(c) state courts have reached two conflicting conclusions.[20]

---

the states as well as the federal courts must defer to the exclusive competency of the National Labor Relations Board. *Id.* at 245 (emphasis added). *See, e.g.*, Hotel Employees Local 255 v. Sax Enterprises, 358 U.S. 270 (1959); Terrizzi Beverage Co. v. Brewery Drivers Local 830, 408 Pa. 380, 184 A.2d 243 (1963); Navios Corp. v. National Maritime Union, 402 Pa. 325, 166 A2d 625 (1960); Wax v. Int'l Mailers Union, 400 Pa. 173, 161 A.2d 603 (1960). *See generally*, 69 DICK. L. REV. 319 (1965).

16. Marine Engineers Bene. Ass'n v. Interlake Steamship Co., 370 U.S. 173 (1962); Terrizzi Beverage Co. v. Brewery Drivers Local 830, 408 Pa. 380, 184 A.2d 243 (1962); Stoddard-Wendle Motor Co. v. Automotive Machinists Lodge 942, 48 Wash. 2d 519, 295 P.2d 305 (1956); *see generally*, 51A C.J.S. *Labor Relations* § 530 (1948).

17. NLRB Press Release No. R-576, issued October 2, 1958.

18. 122 NLRB 88 (1958). The NLRB prefers fixed standards rather than an *ad hoc* policy for determining its exercise of jurisdiction. *See, e.g.*, Siemons Mailing Service, 122 NLRB 81, 83 (1958).

19. Carolina Supplies and Cement Co., 122 NLRB 88 (1958). Although in *Stryjewski* the gross annual sales were $230,000, the state court used the addition process consistent with board policy. Thus, for jurisdictional purposes the lower court added the Stryjewskis' gross receipts to those of the importing distributors. 426 Pa. at 518, 233 A.2d at 272 (dissenting opinion).

20. Courts which hold there must be an actual declination in each case: Colorado State Council of Carpenters v. District Court, 155 Colo. 54, 392 P.2d 601 (1964); Barksdale & LeBlanc v. Electrical Workers Local 130, 143 So. 2d 770 (La. App. 1962); *cf.* Hirsh v. McCulloch, 303 F.2d 208 (D.C. Cir. 1962); Bowlavar, Inc. v. Truck Drivers Local 90, 252 Iowa 851, 109 N.W.2d 22 (1961). Courts which hold that they may apply the standards themselves: Russell v. Electrical Workers Local 569, 64 Cal. 2d 22, 409 P.2d 926, 48 Cal. Rptr. 702 (1966); Continental Slip Form Builders v. Construction Laborers Local 1290, 193 Kan. 459, 393 P.2d 1004 (1964); Meat Cutters Local 227 v. Fleischaker Co., 284 S.W.2d 68 (Ky. App. 1964); Smith v. Hoel, 188 N.E.2d 195 (C.P. Ohio 1963). Prior to *Stryjewski*, a Pennsylvania lower court leaned toward the prospective decline approach: Reilly's Beer Distributors v. Teamsters Local 830, 52 Del. 138 (C.P. Pa. 1964).

The California case of *Russell v. Electrical Workers Local 569*[21] represents the "prospective decline" approach which permits the state courts to anticipate the Board's decision over a class of cases using the published yardsticks. In *Russell*, the plaintiff, an electrical contractor, began work with a three-man non-union crew on an apartment building then under construction. Defendant union began picketing. Some of the contractor's supplies moved in interstate commerce, and the parties agreed that the labor dispute came within the NLRB's statutory jurisdiction. The contractor's gross annual revenue, however, was only $19,000. The contractor applied to the Superior Court, which granted a preliminary injunction, pending trial, against further picketing and against work stoppages.[22] The California Supreme Court affirmed this decision. In a unanimous decision, the court said:

> We hold that the jurisdiction exercised by the state courts pursuant to section 164(c) does not depend upon a showing that the board has, *in fact*, declined to act. Rather, we believe that the party seeking relief need only demonstrate, on the basis of published regulations and decisions of the board, that the case is one which the board would decline to hear.[23]

Opposed to this view is the "wait and see" approach exemplified by *Colorado State Council of Carpenters v. District Court.*[24] There, a construction contractor was to build a water reservoir at a cost of approximately $460,000. The Colorado court, without giving supporting reasons, took the position that state courts have no jurisdiction to enjoin peaceful picketing in the absence of a showing that the NLRB has *specifically declined* to accept jurisdiction over the controversy.[25]

Prior to *Stryjewski*, Pennsylvania's position was unclear. In a 1963 case in which the gross annual dollar volume of the retail business involved exceeded the minimum stated by the NLRB in its published jurisdictional yardsticks, the Supreme Court of Pennsylvania held an actual decline was necessary.[26] One year later, how-

---

Compare Terrizzi Beverage Co. v. Brewery Drivers Local 830, 408 Pa. 380, 184 A.2d 243 (1963) (actual decline necessary where interstate shipments exceed $500,000 annually and thus come within published jurisdictional guidelines).

21. 64 Cal. 2d 22, 409 P.2d 926, 48 Cal. Rptr. 702 (1966).

22. Russell v. Electrical Workers Local 569, 43 Cal. Rptr. 725 (Cal. App. 1965).

23. 64 Cal. 2d at 23, 409 P.2d at 926, 48 Cal. Rptr. at 703 (emphasis added). See note 20 *supra*.

24. 155 Colo. 54, 392 P.2d 601 (1964).

25. *Id.* at 57, 392 P.2d at 602.

26. Terrizzi Beverage Co. v. Brewery Drivers Local 830, 408 Pa. 380, 194 A.2d 243 (1963). The brewery's shipments were interstate and were in excess of the $50,000 minimum. The NLRB has indicated jurisdiction would be asserted over all enterprises transporting commodities in interstate commerce provided they derive at least $50,000 in gross annual revenue from such operations. *See* HPO Service, Inc., 122 NLRB 394 (1958).

ever, in *Reilly's Beer Distributors v. Teamsters Local 830*,[27] defendant union attempted through peaceful picketing to gain representation of the plaintiff's non-union employees. Plaintiff Reilly's gross annual business was shown to be less than half the published minimum for retail businesses not engaged in transporting commodities in interstate commerce. The common pleas court said an actual decline was unnecessary. It felt that by previously published NLRB jurisdictional yardsticks, the Board *had already declined* this case. Therefore, it granted a preliminary injunction against the picketing.[28]

Notwithstanding *Reilly's Beer Distributors* and the position taken by the Pennsylvania Labor Relations Board,[29] *Stryjewski* adopted the view that section 164(c) does not allow a state court using NLRB yardsticks to anticipate NLRB reaction in a particular case. Assuming, *arguendo*, that the plaintiff had proved that, in all probability, the Board would refuse to act,[30] the court nevertheless chose not to anticipate the Board's *actual* decision. Observing that although the Board through its rules has established certain jurisdictional standards, the cases necessarily will present many variables. Until there has been an actual declination to act by the NLRB in a particular case, said the court, individual state court resolutions without direction would result in a chaotic situation harmful to a national labor policy.[31] Therefore, it concluded, in the absence of a United States Supreme Court construction of section 164(c) and in the absence of an actual decline to act by the Board, a state court should not act.[32]

Stryjewski is difficult to reconcile with the principle justifying a petition for preliminary injunctive relief: the need for swift action. To require that the NLRB must in each case actually decline jurisdiction before the state judicial forum becomes available

27. 52 Del. 138 (C.P. Pa. 1964).

28. *Id.* at 143.

29. The procedure followed by the Pennsylvania Labor Relations Board is to hear evidence as to the size of the employer's business and compare this with the NLRB's published standards to determine jurisdiction. TWENTY-THIRD ANNUAL REPORT OF THE PENNSYLVANIA LABOR RELATIONS BOARD at 1 (1959).

30. The court found, contrary to the lower court, the only Stryjewski "employee" was their son. 426 Pa. at 517, 233 A.2d at 267. By the provisions of the Labor-Management Relations Act of 1947, such a person would not be included in the term employee. Labor-Management Relations Act of 1947 § 101, 29 U.S.C. § 152(3) (1964); Citrus Ass'n v. NLRB, 109 F.2d 76 (9th Cir. 1940), *cert. denied*, 310 U.S. 632, *reh. denied*, 311 U.S. 724 (1940). The NLRB actually declined to take jurisdiction on the day of the oral argument before the court. 426 Pa. at 525, 233 A.2d at 271.

31. Chief Justice Bell, dissenting, strongly challenged whether such cases would interfere with national policy: "Imagine a business composed of husband and wife and son endangering the *national* policy." 426 Pa. at 520-21, 233 A.2d at 269 (dissenting opinion).

32. 426 Pa. at 518-19, 233 A.2d at 268.

strips the preliminary injunction of its effectiveness.[33] As the California court noted in *Russell*:

> To require the parties to submit every case to the board for determination of the jurisdictional question would frustrate the clearly manifested intent of Congress that the board be empowered to delimit the boundaries of its jurisdiction by "rule of decision or by published rules." We would strip these rules of their legal significance were we to require reference of every case to the board.[34]

Moreover, a great majority of Pennsylvania employers fall below the minimum standards set by the Board for its exercise of jurisdiction.[35] The *Stryjewski* rule would seem to deny many of the state's citizens relief in labor disputes neither protected nor preempted by the NLRB.[36] In his dissent in *Stryjewski*, Chief Justice Bell found that: "By the time the NLRB *specifically* decides that it will not take jurisdiction of this case . . . the poor little Stryjewski family will be broke, or out of business."[37]

Until the United States Supreme Court clarifies this area, the "prospective decline" approach of the California court seems the better course to follow. By examining Board decisions, courts can determine specific classes of cases over which the NLRB will refuse

---

33. See the dissenting opinion by Roberts, J., 426 Pa. at 525, 233 A.2d at 271.

34. 64 Cal. 2d at 25, 409 P.2d at 928, 43 Cal. Rptr. at 704.

35. The size of the no-man's-land has been estimated by the Pennsylvania Labor Relations Board. By their figures 90% of Pennsylvania employers employ 24 or less employees, and most if not all of these employers have a volume of business falling below the standards set by the NLRB. These businesses employ about 20% of the employees of the state. NINETEENTH ANNUAL REPORT OF THE PENNSYLVANIA LABOR RELATIONS BOARD, at 2 (1955). *See also*, Stephens, *The No Man's Land Of Labor Relations Remains Unoccupied*, 14 LAB. L.J. 192, 193 (1963).

36. Compare the position of the Idaho Supreme Court in Lockridge v. Motor Coach Employees, 93 Idaho 201, 369 P.2d 1006 (1962):

> In view of the unsettled state of the federal law, our course is clear. We must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs "neither protected nor prohibited" nor "preempted" by federal law, or more appropriately, by the National Labor Relations Board.

Id. at 208, 369 P.2d at 1010.

37. 426 Pa. at 520-21, 233 A.2d at 269 (dissenting opinion). As one writer has prophetically put it:

> [N]either the small employer nor his employees are given the protection of the laws which Congress passed to promote collective bargaining. This is a paradox, since it is in the smaller shops and firms that most of the unorganized workers are located, and it is in this area where collective bargaining is the weakest. Perhaps some people think that this situation is beneficial to the smaller employer. One would only have to ask them what they would do if they managed a small business and a representative of a large union, for example, the Teamsters, appeared and demanded that they sign a collective bargaining agreement with the union.

Stephens, *The No Man's Land Of Labor Relations Remains Unoccupied*, 14 LAB. L. J. 192, 200 (1963).

jurisdiction.[38] The Board itself has not said whether it wishes the opportunity to decline jurisdiction in each case prior to state action. A construction of section 164(c) by the courts to exclude those labor disputes where business volume falls below published NLRB yardsticks would enable courts to anticipate Board action, issue necessary injunctive relief, and fill the vacuum that now exists. The contrary "wait and see" approach, espoused by the *Stryjewski* court in an effort to further an ill-defined national labor policy, may mean financial ruin for many smaller retail businesses through loss of business caused by possibly illegal picketing. At the very least, these businesses would operate in Pennsylvania under the distinct disadvantage of having a statutory right without an effective legal remedy.

PETER F. STUART

38. Radio and Telephone Broadcast Technicians v. Broadcast Service, Inc., 380 U.S. 255 (1965). *Cf.* Building & Trades Council v. Broome, 377 U.S. 126 (1964).

CRIMINAL LAW—ESCOBEDO AND MIRANDA VIOLATIONS CAN BE HARMLESS ERROR

Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1967)

Following his conviction for second degree murder, Leroy Padgett filed a motion under the Post Conviction Hearing Act[1] alleging that the trial court committed error in allowing a statement to be introduced into evidence which was obtained in the absence of counsel when assistance of counsel was required by *Escobedo v. Illinois*.[2] Padgett's statement was used at trial for impeachment purposes only. The Commonwealth conceded that the statement in question was obtained from Padgett under circumstances that violated the constitutional requirements of *Escobedo* but contended that the statement was admissible for the purpose of impeaching credibility. The court rejected this contention since "a careful reading of *Escobedo* in light of the gloss placed upon that decision by *Miranda v. Arizona*"[3] makes the conclusion inescapable that a statement obtained in violation of *Escobedo* may not be used by the prosecution, even for impeachment purposes.[4] The Common-

---

1. PA. STAT. ANN. tit. 19, § 1180 (Supp. 1966).

2. 378 U.S. 478 (1964). In this case the Supreme Court set up the following constitutional safeguards:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution . . . and that no statement elicited by the police during the interrogation may be used against him at criminal trial.

Id. at 490, 491.

3. 384 U.S. 436 (1966). Here the Supreme Court refined the above constitutional safeguards as follows:

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege . . . and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. . . . But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Id. at 478, 479.

4. 428 Pa. at 231, 232, 237 A.2d at 210.

wealth, however, asserted that even if the use of the statement was error, it was harmless error. The court agreed, holding that *Escobedo* and *Miranda* violations can be harmless error and found the error in *Padgett* to be such a case.[5]

In holding that *Escobedo* and *Miranda* violations can be harmless error, the court in *Padgett* had to resolve a conflict between two doctrines. The first is the harmless error standard of *Chapman v. California*[6] in which the Supreme Court of the United States held:

> there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction.[7]

However, before a constitutional error can be deemed harmless, under the *Chapman* rule, the court must believe that it was "harmless beyond a reasonable doubt" and the burden of so proving is on the prosecution.[8] Running counter to the harmless error rule is the doctrine of automatic reversal by which there are "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. . . ."[9]

Since *Chapman* there have been a number of instances where the harmless error standard has been applied to constitutional error other than an *Escobedo* or *Miranda* violation,[10] yet in only two of these cases was the error explicitly held to be "harmless beyond a reasonable doubt."[11] The United States Supreme Court

---

5. *Id.* at 236, 237 A.2d at 212.

6. 386 U.S. 18 (1967).

7. *Id.* at 22. In *Chapman* the question was whether numerous unfavorable references by the prosectution and the trial judge to defendant's refusal to testify under the Fifth Amendment necessitated automatic reversal. The Court concluded that this was constitutional error but declined to reverse unless the error was harmful. The error was found to be harmful and the conviction was reversed.

8. *Id.* at 24.

9. *Id.* at 23. The Court in *Chapman* gave three examples of constitutional errors that necessitate automatic reversal under the above standard: Gideon v. Wainwright, 372 U.S. 335 (1963) (denial of assistance of counsel at trial); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge).

10. *See* United States v. Wade, 388 U.S. 218 (1967) (denial of assistance of counsel at a post-indictment lineup); Granger v. Peyton, 379 F.2d 709 (4th Cir. 1967); Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967); Vanater v. Boles, 377 F.2d 898 (4th Cir. 1967); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967) (conflicting interests of counsel); United States v. Ramseur, 378 F.2d 902 (6th Cir. 1967); Commonwealth v. Pearson, 427 Pa. 45, 233 A.2d 552 (1967) (use at trial of evidence obtained by an illegal search and seizure); People v. Coffey, 67 A.C. 145, 430 P.2d 15, 60 Cal. Rptr. 457 (1967) (use of a constitutionally invalid prior conviction to impeach defendant's credibility); People v. Smith, 38 Ill. 2d 13, 230 N.E.2d 188 (1967) (denial of right to cross-examine).

11. *See* United States v. Ramseur, 378 F.2d 902 (6th Cir. 1967); Vanater v. Boles, 377 F.2d 898 (4th Cir. 1967).

has held, however, that the use of an inadmissible confession at trial requires reversal regardless of other competent evidence to uphold the conviction.[12] The reason most often advanced for this rule is that "once a confession is introduced, it is virtually impossible to determine the actual weight accorded it by the jury since a confession normally constitutes persuasive evidence of guilt."[13]

California has attempted to resolve these conflicting considerations by holding that the introduction of a *confession* violative of *Escobedo* or *Miranda* required automatic reversal while the introduction of an *admission* so obtained can be tested by the harmless error standard of *Chapman*.[14] But California has made an exception to this rule when competent confessions are available and admitted into evidence along with the constitutionally tainted confession.[15] In such a case the court is free to apply the harmless error rule even to confessions.[16] Nevada also follows this exception and applies harmless error to confessions.[17] A recent California case on the subject is *People v. Alesi*[18] in which the defendant was charged with sales of heroin and possession of marijuana. The defendant was arrested and taken to the police station in a police car. While in the vehicle and before he was warned of his constitutional rights, he was asked about a certain sale of heroin. He replied that he did not think he was guilty of the sale, that he thought a girl companion had made the sale, but that he was along at the time.[19] The defendant's statement which the appellate court referred to as an admission was allowed into evidence. The lower court's ruling was held to be harmless error under the *Chapman* standard since the statements admitted into evidence were entirely consistent with the accused's defense at trial.[20]

Difficulty arises with the California confession-admission dichotomy chiefly in distinguishing an admission from a confession.[21]

---

12. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Jackson v. Denno, 378 U.S. 368 (1964); Haynes v. Washington, 373 U.S. 503 (1963); Payne v. Arkansas, 356 U.S. 560 (1958).

13. 65 MICH. L. REV. 563, 566 (1967). This article presents a thorough treatment of the pre-*Chapman* harmless error-automatic reversal dichotomy.

14. People v. Powell, 67 A.C. 25, 59 Cal. Rptr. 817, 429 P.2d 137 (1967); *In re* Cline, 255 A.C.A. 135, 63 Cal. Rptr. 233 (1967).

15. *See* People v. Cotter, 63 Cal. 2d 386, 405 P.2d 862, 46 Cal. Rptr. 622 (1965); People v. Jacobson, 63 Cal. 2d 319, 405 P.2d 555, 40 Cal. Rptr. 515 (1965); People v. Patton, 255 A.C.A. 385, 62 Cal. Rptr. 865 (1967).

16. People v. Patton, 255 A.C.A. 385, 62 Cal. Rptr. 865 (1967).

17. Guyette v. Nevada, 438 P.2d 244 (Nev. 1968).

18. 67 A.C. 883, 434 P.2d 360, 64 Cal. Rptr. 104 (1967).

19. *Id.* at 885, 434 P.2d at 364, 64 Cal. Rptr. at 108.

20. *Id.*

21. *In re* Cline, 255 A.C.A. 135, 63 Cal. Rptr. 233 (1967) stated that:

> A confession, in criminal law, is a statement by a person accused of crime to the effect that he is guilty of the crime; unless the statement is broad enough to include every essential necessary to make out a case against him, it is not a confession of guilt.

Of note in this regard is the Ohio rule which apparently requires an automatic reversal for the use of any statements violative of *Escobedo*, without distinguishing between confessions and admissions.[22] Nevertheless, it is submitted that the California distinction between confessions and admissions is valid. The Supreme Court held that constitutional error can be tested by a harmless error standard before either *Escobedo* or *Miranda* were decided.[23] With a constitutional harmless error standard already available, it would seem that the Supreme Court could have considered whether the violations in *Escobedo* or *Miranda* were harmless error rather than reversing automatically, but this point was never discussed. Since both *Escobedo* and *Miranda* involved the use of inadmissible confessions, this would seem to indicate that the Supreme Court was of the opinion that the use of *confessions* violative of *Escobedo* or *Miranda* necessitated automatic reversal. Considering the number of recent state cases applying the harmless standard to *admissions*, the silence of the Supreme Court may be considered as acquiescence on this point.

In view of the foregoing, it would seem that the decision in *Padgett* is sound. In *Padgett*, there was only a very limited use of the defendant's statement for impeachment purposes.[24] This cer-

---

> [citing cases]. An admission, in contrast, is but an acknowledgement of some fact or circumstance which in itself is insufficient to authorize a conviction and which only tends toward the ultimate proof of guilt. [citing cases].

Id. at 140, 63 Cal. Rptr. at 238. The court stated that while some statements are easily labeled confessions or admissions, others involve difficulty. *Id.*

22. *See* State v. Gresham, 10 Ohio App. 2d 199, 227 N.E.2d 248 (1967). In discussing the effect of an *Escobedo* violation, the court said:

> The Supreme Court of the United States has precluded the application of the "harmless error" rule to cases wherein there is an improper admission of inadmissable statements and has in effect held that such improper admission constitutes prejudicial error per se even where there exists other evidence to establish guilt.

Id. at 209, 227 N.E.2d at 251. It is to be noted, however, that the court cited, *inter alia*, for this proposition Haynes v. Washington, 373 U.S. 503 (1963), and Payne v. Arkansas, 356 U.S. 560 (1958). Both cases involved confessions, so perhaps the court in *Gresham* intended to limit its automatic reversal rule to situations involving confessions only.

23. Fahy v. Connecticut, 375 U.S. 85 (1963) (use of evidence obtained by an illegal search and seizure).

24. Padgett was a bartender and the murder occurred following a disagreement at the bar between Padgett and the deceased, one Howard. The use of Padgett's statement at trial was as follows:

> On four occasions during Padgett's cross-examination the Commonwealth quoted from Padgett's statement; two can be classified as involving contradictions, one as an omission and one as consistent. The two contradictions comprise the following: Padgett testified at trial that Howard was standing at the bar when he accused Padgett of taking his drink while in the statement Padgett placed Howard as seated at the bar; at trial Padgett insisted that he was not certain as to the length of his acquaintance with Howard (but that it was more than one year) although in his

tainly falls short of admitting into evidence an inadmissible confession. The court was satisfied that the use of Padgett's statement was "harmless beyond a reasonable doubt" as required by *Chapman*. Assuming that the jury chose to believe Padgett's statement and reject his trial testimony, there was nothing in that statement which in any way derogated from Padgett's version of the crime.[25]

The court in *Padgett*, however, found a basis other than the confession-admission dichotomy to justify the application of the *Chapman* harmless error rule. The court offered *United States v. Wade*[26] as authority that the Supreme Court would hold that an *Escobedo* or *Miranda* violation could be harmless error. *Wade*, drawing upon the premises of *Escobedo* and *Miranda*, held that a post-indictment lineup was a critical stage of the prosecution which entitled the defendant to the assistance of counsel.[27] The case was remanded to the district court to determine "whether the in-court identifications had an independent source or whether, in any event, the introduction of the evidence was harmless error" under the *Chapman* standard.[28] Thus, the Supreme Court considered it possible that the introduction of evidence based upon a lineup in which the defendant was deprived of his constitutional right to counsel could be harmless error. Furthermore, *Wade's* dependence upon *Escobedo* and *Miranda* indicated that the harmless error rule can be applied to *Escobedo* and *Miranda* violations.[29]

The Padgett court also drew a further parallel between *Wade* violations and *Escobedo* and *Miranda* violations by examining the retroactivity-prospectively of those cases. In *Johnson v. New Jersey*[30] it was held that neither *Miranda* nor *Escobedo* applied

---

statement he related that he knew Howard for about one year. Padgett testified that he told Howard that he had not served him a drink, but the statement, as pointed out by the prosecution, omitted any reference to this remark. Finally, Padgett testified that, at the instant the fatal shot was fired, Howard was "moving in" as if he was going to strike Padgett, while in the statement, as read to the jury, Padgett said "it was as if he was going to leap on you."

428 Pa. at 237, 237 A.2d at 213.

25. 428 Pa. at 237, 238, 237 A.2d at 213. It is to be noted that nowhere in *Padgett* did the court refer to its language in the prior case of Commonwealth v. Vivian, 426 Pa. 192, 231 A.2d 301 (1967). That case involved an *Escobedo* violation and the court stated that a defendant is deprived of due process "if his conviction is founded, in whole or in part, upon an unconstitutionally tainted *admission or confession* without regard for the truth or falsity thereof, even though there is ample evidence aside from the admission or confession to support the verdict." 426 Pa. at 195, 196, 231 A.2d at 303 (emphasis added). This was referred to by the court in *Vivian* as the automatic reversal doctrine. *Id.* at n.2.

26. 388 U.S. 218 (1967).

27. *Id.* at 227.

28. *Id.* at 242.

29. 428 Pa. at 234, 237 A.2d at 212.

30. 384 U.S. 719 (1966).

retroactively. Similarly, *Stovall v. Denno*[31] held that *Wade* did not apply retroactively. *Stovall* said that in deciding whether or not to make a decision retroactive, the impact that the prohibited procedure may have upon the reliability of the fact-finding process must be "weighed against the prior justified reliance on the old standard and the impact of retroactivity upon the administration of justice."[32] It was under this same standard that *Miranda* and *Escobedo* were held not to be retroactive.[33] *Padgett* found that *Wade, Escobedo* and *Miranda* presented similar considerations for purposes of retroactivity.

Consequently, while the considerations in determining retroactivity may not be identical to those involved in deciding if rights are "so basic to a fair trial that their infraction can never be treated as harmless error,"[34] the primary consideration in either determination is the impact that the right involved has upon the reliability of the fact-finding process.[35] The court apparently concluded that since the tests for retroactivity and automatic reversal are so similar, a vote against retroactivity is a vote against automatic reversal.[36] Support for this conclusion is drawn from the fact that *Wade* was held to be prospective and also did not require automatic reversal.[37]

The difficulty with *Padgett's* reasoning is that while the tests for retroactivity and automatic reversal may be similar the former must be balanced against prior reliance upon the old standard and the impact of retroactivity on the administration of justice, while the latter stands alone. Thus it would be possible to deny retroactivity in a case because the impact on the administration of justice outweighed the impact on the reliability of the fact-finding process, but at the same time grant automatic reversal since there would be nothing to balance out the impact on the reliability of the fact-finding process.

It is submitted that these difficulties would be avoided by following the California rule that the introduction into evidence of a confession violative of *Escobedo* or *Miranda* calls for automatic reversal, while the use of anything less than a confession can be tested by the harmless error rule of *Chapman*.[38] This would permit the same result in *Padgett* since the defendant's confession was never admitted into evidence. It would also recognize that once a confession is admitted into evidence, it is virtually impossible for it to

31. 388 U.S. 293 (1967).
32. *Id.* at 298.
33. *See* Johnson v. New Jersey, 384 U.S. 719, 728, 729 (1966).
34. Chapman at 23.
35. 428 Pa. at 235, 237 A.2d at 212.
36. *Id.* at 236, 237 A.2d at 212. The Nevada Supreme Court in the case of Guyette v. Nevada, 428 P.2d 244 (Nev. 1968), follows this reasoning.
37. 428 Pa. at 235, 237 A.2d at 212.
38. Cases cited note 14 *supra*.

be harmless error,[39] since its true impact on the jury cannot be ascertained.

TIMOTHY MCNICKLE

39. The cases cited in note 15 *supra* demonstrate an exception to this rule.

PRODUCTS LIABILITY—A LIMITATION ON THE DOCTRINE OF STRICT LIABILITY OF § 402A

Forry v. Gulf Oil Corp., 428 Pa. 334, 237 A.2d 593 (1968).

A restriction on the recently developing doctrine of strict tort liability in products liability cases was iterated by the Supreme Court of Pennsylvania in *Forry v. Gulf Oil Corp.*[1] The court held that in order to recover under the rule of the Restatement (Second) of Torts, section 402A, the plaintiff must prove that the defective condition of the product was the *sole* cause of the plaintiff's injuries. Thus, even though there was sufficient evidence to enable a jury to find a defect in the product and thus invoke the rule of strict liability, the court would not permit the plaintiff's case to go to the jury because of the possible intervening negligence of a third party.

The injury to the plaintiff, a service station operator, occurred when a new tire exploded while he was attempting to "reseat" the tire on the wheel. The tire had been purchased and mounted by the retailer who in turn had purchased it from Gulf Tire & Supply Company, the distributor of the manufacturer, B. F. Goodrich Company. The following day the purchaser of the tire was informed that his wheel was "wobbling." He took his car to Forry to have the wheel checked. An inspection of the wheel disclosed that the inner side of the tire appeared to be "unseated" at one point. To remedy this Forry removed the wheel, placed it on a tire mounting machine, deflated then partially inflated the tire, removed the tire-wheel assembly and placed it on the floor. While inflating the tire again, the tire exploded severely injuring Forry.

Forry sued the retail seller, the distributor and the manufacturer and alleged that all three defendants were jointly and severally liable on theories of negligence and strict liability.[2] Upon completion of plaintiff's case as to liability the trial court granted a compulsory nonsuit and on appeal the supreme court affirmed by an equally divided court.

In Pennsylvania the injured consumer has three theories of liability which he can assert as bases for the manufacturer's liability: (1) breach of warranty through an action of assumpsit, (2) negligence through an action of trespass, and (3) strict liability through an action of trespass. Breach of warranty was not

1. 428 Pa. 334, 237 A.2d 593 (1968).

2. While the complaint contained language of negligence, it would also have sufficed to state a cause of action for strict liability. Webb v. Zern, 422 Pa. 424, 427, 220 A.2d 853, 854-55 (1966); *see* 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 46.02[2] (1965); Emroch, *Pleading and Proof in a Strict Products Liability Case*, 1966 INS. L.J. 581, 586.

available to Forry because of his lack of privity with the defendants,[3] therefore he relied on negligence and strict liability.

The doctrine of strict tort liability of a supplier of a defective product for physical harm to a user or consumer has recently been incorporated into Pennsylvania law by the adoption of Section 402A of the Restatement (Second) of Torts.[4] Section 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The comments to 402A indicate that it applies to tires[5] and that it requires no privity of contract for the imposition of liability,[6] so that all three defendants in *Forry* would be considered "sellers" within the meaning of that section.[7]

The rule of strict liability requires that plaintiff prove that the product was in a defective condition when it left the hands of the seller.[8] However, the limitation imposed by the supreme court in *Forry*—that is, the defect be the *sole* cause of the accident —is not borne out by a reading of 402A and the comments thereto. Nor do other portions of the Restatement support this ruling. The Restatement rules concerning causation in negligence cases indicate that the conduct of any one tortfeasor need not be the sole cause of the accident in order to render him liable.[9]

---

3. Miller v. Preitz, 422 Pa. 383, 221 A.2d 320 (1966); Hochgertel v. Canada Dry Corp., 406 Pa. 610, 187 A.2d 575 (1963); Loch v. Confair, 361 Pa. 183, 63 A.2d 24 (1949); Marcus v. Spada Bros. Auto Service, 41 Pa. D. & C.2d 794 (C.P. Phila. 1967); *cf.* Yentzer v. Taylor Wine Co., 414 Pa. 272, 199 A.2d 463 (1964).

4. Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966). See 71 DICK. L. REV. 129 (1966).

5. RESTATEMENT (SECOND) OF TORTS § 402A, Comment d (1965).

6. *Id.* Comment l.

7. *Id.* Comment f; Forry v. Gulf Oil Corp., 428 Pa. 334, 343-44, 237 A.2d 593, 599 (1968). For this reason the court's discussion and adoption of § 400, providing for the vicarious liability of one who puts out as his own a chattel manufactured by another, was unnecessary in this case.

8. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965).

9. RESTATEMENT (SECOND) OF TORTS § 430, Comment d (1965).

If the manufacturer negligently constructs a defective tire and his distributor's vendee negligently mounts the tire, both should be liable to the injured person.[10] It appears that this has been the law of Pennsylvania. In *Loch v. Confair*[11] the plaintiff was injured when she picked up a bottle of ginger ale in a grocery store and the bottle exploded. The court stated: "[I]f the occurrence of the accident was due to negligence on the part of either of the defendants [grocer or bottler], plaintiffs should be entitled to redress."[12] The rule should be the same in a strict liability case, so that the intervening negligence of a third person will not relieve the maker of a defective product of his strict tort liability.[13]

In *Lewis v. United States Rubber Co.*,[14] the plaintiff was injured when a tire, which he was mounting on a wheel, exploded in his face. The Pennsylvania Supreme Court upheld a jury verdict for the plaintiff based on the manufacturer's negligence. The cause of the explosion was found to be a defective bead assembly, the same defect present in the *Forry* case. The court in *Forry* stated:

> [O]n the record before us, there is evidence from which the jury could have found the existence of a defect in the tire . . . it could reasonably be inferred that this defect in the tire existed when it left the hands of Goodrich [the manufacturer].[15]

In *Lewis* the jury was permitted to infer negligence by circumstantial evidence—the defective bead assembly, proper mounting procedure and explosion. It is submitted that whether the theory of recovery be negligence as in *Lewis* or strict liability as in *Forry*, the possible intervening negligence of a third person which *contributed to* the accident should not bar the plaintiff's recovery.[16]

The decision in *Forry* appears to rest on the fact that the plaintiff failed to show negligence by the person who mounted the tire. Thus, his case fell because it was based on showing that the accident occurred as a result of the defective condition of the tire *and* negligence in the mounting of the tire. The problem with

---

10. 1 L. FRUMER & M. FRIEDMAN, *supra* note 2 § 11.04[4] (1964); *see, e.g.*, Post v. Manitowoc Engineering Corp., 88 N.J. Super. 199, 211 A.2d 386 (1965).

11. 372 Pa. 212, 93 A.2d 451 (1953).

12. *Id.* at 217, 93 A.2d at 453; *cf.* Majors v. Brodhead Hotel, 416 Pa. 265, 271, 273, 205 A.2d 873, 877-78 (1965) (not a products liability case).

13. There is very little authority on this precise question but an indication of things to come may be *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) where the manufacturer of an automobile was held strictly liable for a defect in the automobile despite the fact that the defect may have been caused by something that the authorized dealer did or failed to do.

14. 414 Pa. 626, 202 A.2d 20 (1964).

15. 428 Pa. at 343, 237 A.2d at 598. *See* L. FRUMER & M. FRIEDMAN, *supra* note 2 § 11.01[4] (1964).

16. See Loch v. Confair, 372 Pa. 212, 93 A.2d 451 (1953); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

such a result, as pointed out in the dissent.[17] is that Forry also alleged that each defendant was solely liable to him for his individual acts.[18] Therefore plaintiff's showing of the defect in the tire and the explosion should have been enough under the rationale of the *Lewis* case to get plaintiff's case against the manufacturer to the jury on an inference of negligence.[19] Certainly the court's subsequent adoption of strict liability in tort should not deprive Forry of the benefit of the *Lewis* decision.[20]

If the plaintiff proves that a defect existed in the product and that it was a substantial factor in bringing about the injury, he has sustained the burden of establishing causation in fact.[21] This is especially true where, as in *Forry*, the circumstantial evidence is such as to justify an inference that the harm was caused by a defect in the product.

WILLIAM T. DYER

17. 428 Pa. at 348-49, 237 A.2d at 601.

18. The Pennsylvania Rules of Civil Procedure permit the plaintiff to state his claim in the alternative. PA. R. CIV. P. 1020(c).

> Alternative pleading has become, since the adoption of the Rules, a common method of overment. It may be used to join two or more defendants *when it is not clear which defendant was responsible for the loss* or to join two or more theories of action when it is not certain which theory is applicable to the facts.

Forry v. Gulf Oil Corp., 428 Pa. 334, 348, 237 A.2d 593, 601 (1968) (dissenting opinion), *quoting* 1 GOODRICH-AMRAM, STANDARD PENNSYLVANIA PRACTICE § 1020(c)-1, at 144 (1957).

19. Lewis v. United States Rubber Co., 414 Pa. 626, 630, 202 A.2d 20, 22-23 (1964).

20. RESTATEMENT (SECOND) OF TORTS § 402A, comment a (1965) provides in part: "The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved."

21. Emroch, *supra* note 2 at 591.

INFANTS—STATE MUST PROVE DEFENDANT TO BE A DELINQUENT BEYOND A REASONABLE DOUBT—PROOF BY PREPONDERANCE OF EVIDENCE INSUFFICIENT

In re Urbasek, 38 Ill. 535, 232 N.E.2d 716 (1968).

Karen Mitchell, eleven years old, had been missing for approximately four hours. She had been playing with Robert F. Urbasek, the eleven year old defendant. Karen's mother asked Robert of her whereabouts and received unsatisfactory answers. Mrs. Mitchell then was permitted by the defendant and his sister to look in the Urbasek garage where Karen's body was found, stabbed seven times. The cause of death was knife stabs in the lungs and liver and defendant Urbasek was indicted for murdering her. The state's petition charged the defendant with violation of a state law which, if proved, was grounds for declaring the defendant a juvenile delinquent. The hearing judge found *by a preponderance of the evidence* that a state law had been violated and that Urbasek was a delinquent and the Illinois Appellate Court affirmed. On appeal the Illinois Supreme Court reversed, holding that a finding of delinquency in a minor for an act which would be criminal in an adult must be supported by proof *beyond a reasonable doubt*, not merely by a preponderance of the evidence.

At common law there was no difference in the treatment accorded juveniles and adults who committed the same crimes and consequently the procedural rules for each were alike.[1] In the nineteenth century, however, courts and legislatures initiated changes by which juveniles were to be separated from adult offenders in all matters.[2] The "involved"[3] juvenile was not sent to prison where he would meet adult criminals and be exposed to prison vices; rather, he was sent to a reformatory with children of his own age where the state, under the *parens patriae* theory, would take the place of his parents and rear him to be an admirable product of society and the juvenile court system.[4]

The minor was not to be considered a criminal although he

1. Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

2. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

3. "Involved" is the term used by most juvenile courts in lieu of "guilty."

4. *See, e.g.*, Application of Gault, 387 U.S. 1 (1967); *In re* Urbasek, 38 Ill. 535, 232 N.W.2d 716 (1968); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

committed an offense which would be criminal for an adult.[5] The reason for the difference was "[t]o get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma. . . ."[6] The juvenile court judge would only be the first in the line of substitute parents which the minor would meet before he is released from the reformatory. "Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work."[7] This is the ideal.

The paternal treatment of the minor after he is "convicted", however, is really only anti-climatic of the juvenile court system's removal of the minor from the adult criminal world. More importantly, his special status precludes him from the procedural safeguards afforded adults during the trial stage. In most juvenile courts hearsay is admissible,[8] and a transcript is not required because the proceedings are to be kept from the public.[9] There is no provision for bail,[10] no notice to parents and, until recently, no privilege against self-incrimination and no right to counsel.[11] All this, and more, is lost because the juvenile is not to be treated as a criminal. Another result is that, in most jurisdictions the juvenile hearing does not conform to the rules of a criminal proceeding;[12] the rules of a civil trial prevail. But even these rules have been eroded by the *parens patriae* theory when, for example, fundamental rights such as the right to cross-examine are taken from the minor.

---

5. *See, e.g.*, Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

6. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909).

7. *Id.* at 120.

8. *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954).

9. *See, e.g.*, Application of Gault, 99 Ariz. 180, 407 P.2d 760 (1965), *rev'd*, 387 U.S. 1 (1967).

10. *See, e.g., In re* Magnuson, 110 Cal. App. 2d 73, 242 P.2d 362 (1952); State v. Fullmer, 76 Ohio App. 335, 62 N.E.2d 268 (1945); Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961).

11. *See, e.g.*, Application of Gault, 99 Ariz. 180, 407 P.2d 760 (1965), *rev'd*, 387 U.S. 1 (1967); *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954).

12. *See, e.g.*, Love v. State, 36 Ala. App. 693, 63 So. 2d 285 (1956); Welfare v. Barlow, 80 Ariz. 249, 296 P.2d 298 (1956); *Ex parte* King, 141 Ark. 213, 217 S.W. 465 (1919); *Ex parte* Leach, 99 Cal. App. 645, 279 P. 157 (1929); Marlow v. Commonwealth, 142 Ky. 106, 133 S.W. 1137 (1911); Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958); Robison v. Wayne Circuit Judges, 151 Mich. 315, 115 N.W. 682 (1908); *In re* Poulin, 100 N.H. 458, 129 A.2d 672 (1957); *Ex parte* Newkosky, 94 N.J.L. 314, 116 A. 716 (1920); People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); Malone v. State, 130 Ohio St. 443, 200 N.E 473 (1936); Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905); State v. Thomasson, 154 Tex. 151, 275 S.W.2d 463 (1955).

Many courts and writers are dissatisfied with the juvenile court theory and its consequences.[13] Two recent Supreme Court cases rectified some of the *parens patriae* theory's faults and raised grave doubt as to the system's effectiveness. *Kent v. United States*,[14] confined to the District of Columbia, held that when the jurisdiction of the juvenile court is waived to permit trial in a criminal court, the minor must be given a hearing on the waiver, his counsel must be given access to the youth's records and the judge must give his reasons for allowing the waiver. In *Application of Gault*[15] the court went further and held that a minor has the right to be given notice of the charges against him, the right to counsel, the right to confront his accusers, the privilege against self-incrimination, and the right to cross-examination.

Many saw the *Gault* case as the beginning of the end of the juvenile court system. This forewarning not only emerges from the language of the opinion but lies in its essence. The expectation of the end of the system has not, however, materialized. One manner by which the "old" system is retained in many states is their adherence to the "proof by a preponderance of the evidence" test.

Although the standards set forth in *Gault* purported to be comprehensive, they left unanswered the important question of the quantum of proof needed to adjudge a minor delinquent—the criminal trial rule of proof beyond a reasonable doubt or the civil trial rule of proof by a preponderance of the evidence.[16] The gap between the two is wide, and is one of the primary differences between civil and criminal trials. Because the juvenile hearing was considered to be essentially a civil trial, the rule that developed in most states was that a minor may be found "involved" by a preponderance of the evidence.[17] Thus, the minor may be com-

13. See the dissenting opinion in *In re* Holmes, 379 Pa. 559, 109 A.2d 523 (1954); *see also* Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960); Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Note, *Due Process in Juvenile Courts*, 2 CATHOLIC U.L.R. 90 (1952); Note, *Rights of Juveniles to Constitutional Guarantees in Delinquency Proceedings*, 27 COLUM. L. REV. 968 (1927).

14. 383 U.S. 541 (1966).

15. 387 U.S. 1 (1967).

16. A third test, clear and convincing proof, is similar to the civil test of preponderance of the evidence and therefore is not dealt with here. For a discussion of this test *see*, Application of Gault, 99 Ariz. 180, 407 P.2d 760 (1965), *rev'd*, Application of Gault, 387 U.S. 1 (1967).

17. *See, e.g.*, United States v. Borders, 154 F. Supp. 214 (N.D. Ala. 1957); *In re* Castro, 243 Cal. App. 2d 402, 52 Cal. Rptr. 469 (1966); *In re* Bigesby, 202 A.2d 785 (D.C. App. 1964); Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928); *In re* Barkus, 95 N.W.2d 674, 168 Neb. 257 (1959); *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); *In re* Smith, 21 App. Div. 2d 737, 249 N.Y.S.2d 1016 (1964); People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); *In re* Ronny, 40 Misc. 2d 194, 242 N.Y.S.2d 844 (Sup. Ct. 1963); Osborne v. State, 343 S.W.2d 467 (Tex. Civ. App. 1961); *In re* Bradley, 167

mitted to a reformatory on the same evidence on which an adult would be acquitted. The minor, furthermore, could be committed for a longer period of time than if an adult had been convicted.[18] Our courts have thereby subjected the minor to greater restraints than an adult while denying him the same safeguards.

The spirit of *Gault* is clearly antithetical to this standard. Nevertheless, some courts still adhere to the preponderance of the evidence test, justifying their action on the ground that the juvenile proceeding is essentially civil.[19] They reason that *Gault* did not change this status. *In re Urbasek* adopted a contrary view. The Illinois Supreme Court held that *Gault* implied that the applicable test is proof beyond a reasonable doubt,[20] thereby overruling its prior cases and voiding a state statute.[21] It concluded:

> [T]he reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that a finding of delinquency for misconduct, which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged. . . . [The Gault] opinion exhibits a spirit that transcends the specific issues there involved, and . . . in view thereof, it would not be consonant with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, while depriving these rights of their full efficacy by allowing a finding of delinquency upon a lesser standard of proof than that required to sustain a criminal conviction.[22]

The transcending spirit to which the Illinois court refers apparently arises from the United States Supreme Court's analogy of a juvenile hearing to a criminal trial and its seeming dissatisfaction with the juvenile court system.[23]

P.2d 97 (Utah 1946); Berry v. Superior Court, 139 Wash. 1, 245 P. 409 (1926). *Contra, In re* Madik, 233 App. Div. 12, 251 N.Y.S. 765 (1931); People v. Anonymous, 53 Misc. 2d 690, 279 N.Y.S.2d 540 (C.C. Nassau 1967); *In re* Rich, 86 N.Y.S.2d 308 (D.R.N.Y. 1949); Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946).

18. The adult found guilty of a crime such as petit larceny or a misdemeanor has imposed upon him a fine or a relatively short prison term. The juvenile, however, may be confined in a reformatory until his majority regardless of his age at the hearing. Thus a ten year old delinquent may be imprisoned eleven years for stealing a bag of candy. *See, e.g.*, Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905); State v. Cagle, 111 S.C. 548, 96 S.E. 291 (1918).

19. *In re* Wylie, 231 A.2d 81 (D.C. App. 1964); *In re* Urbasek, 76 Ill. App. 2d 375, 222 N.E.2d 233 (1966), *rev'd*, 38 Ill. 535, 232 N.E.2d 716 (1968).

20. 38 Ill. 535, 232 N.E.2d 716 (1968).

21. ILL. REV. STAT. ch. 37, §§ 701-4, 704-6 (1965).

22. *In re* Urbasek, 38 Ill. 535, 232 N.E.2d 716, 719 (1968).

23. A federal district court has recently held that juveniles have a Constitutional right to a jury trial. The spirit of the *Gault* opinion was one

The theory of the juvenile court is to call the delinquent minor something other than a criminal,[24] and thereby free the minor from the social consequences that surround criminals and ex-convicts. As *Gault* points out,[25] this result has not been attained. Juvenile delinquents are looked on by the public with the same jaundiced eye awarded to criminals. A youth with a delinquency record is rejected from many jobs, discriminated against by the military and, no doubt, by educational institutions.[26] Moreover, his confinement is similar to that of adult criminals.[27] Both are confined for long periods of time; their companions are prisoners who have been found guilty of crimes ranging from petit larceny to murder, and dictatorial disciplinary measures are substituted for freedom. Terms such as "receiving home," "industrial school," and "camp," are only euphuisms for prison.[28] Speaking of the juvenile's need for counsel the *Gault* court said: "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[29] A person accused of a felony must be found guilty beyond a reasonable doubt. The consequences of a guilty verdict are serious, and apparently the *Urbasek* court believed that if the state may only take an adult's freedom by proving that he is guilty beyond a reasonable doubt, then the minor who likewise can lose his freedom for a number of years, should be proved involved by the same standard. According to *Gault,* clichés and distinctions between civil and criminal proceedings are meaningless when the results of both adjudications are the same.[30]

There was, however, one distinction with which the *Gault* decision was concerned: the lack of safeguards in a juvenile hearing compared to a criminal trial.[31] Holding that the Constitution protects juveniles against self-incrimination, the *Gault* court said: "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."[32] Furthermore, since the result of a conviction for either is basically similar, the juvenile should have the same right as the adult criminal defendant. One of these rights, the Illinois court now holds, is the right of the juvenile to have the state

ground for the holding. Speaking of the right to a jury trial, the court said, "[w]e read *Gault* to require the availability of that right in any federal juvenile proceeding in which a youth is faced with incarceration for the commission of an act alleged to be violative of federal law." Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968).

24. *See* note 5 *supra.*
25. 387 U.S. 24-27 (1967).
26. *Id.*
27. *See, e.g.,* Application of Gault, 387 U.S. 1 (1967); *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954) (dissenting opinion).
28. *Id.*
29. 387 U.S. 1, 36 (1967).
30. *Id.* at 49, 50.
31. *Id.* at 28, 29.
32. *Id.* at 47.

prove him guilty beyond a reasonable doubt.[33]

It may be argued, however, that the *Gault* decision does not imply that a reasonable doubt test is required in juvenile proceedings. *Gault* involved a lack of procedural devices which were common to both criminal and civil trials.[34] The issue simply was: did Gault get a fair hearing? The Supreme Court found he did not. The distinction between criminal and civil is meaningless where the minimum requisite safeguards in either proceeding are absent. In *Gault*, such safeguards were lacking and consequently the hearing was unfair no matter what name it was given. The Supreme Court alluded to this when in *Gault* it reaffirmed its opinion in *Kent v. United States*:[35] "We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."[36] Similarly, the *Gault* court required notice which is ". . . adequate in a civil or criminal proceeding."[37] Therefore, it is not the name by which the proceeding is called but the lack of standards and safeguards that is important in both juvenile and criminal cases. It would seem to follow then, that as long as some standard is used by which the judge may determine the juvenile's guilt, the hearing is a fair one. That standard, though, should be an accepted one such as proof by a preponderance of the evidence, clear and convincing proof, or proof beyond a reasonable doubt. There is another reason to believe that *Gault* was not concerned with the standard of proof issue. Presumably it could have added dicta on this question. Its failure to do so indicates that it was satisfied with the preponderance of the evidence test.

It is submitted that since the consequences of a finding of delinquency are essentially no different than a finding of guilty in an adult criminal case, the reasonable doubt test is the better standard. To subject a youth to confinement for a long period of time on a lesser quantity of proof than that used to find an adult guilty of the same offense is discriminatory, especially by a system which purports to hold as its paramount interest, the rehabilitation and the welfare of the minor. Illinois was a leader in the juvenile court movement of the nineteenth century. By its decision in *In re Urbasek*, it is carrying forward the spirit of that movement by refusing to characterize a youth as a "junior criminal" without proving him such beyond a reasonable doubt.

HENRY E. SEWINSKY, JR.

33. *In re* Urbasek, 38 Ill. 535, 232 N.E.2d 716 (1968).
34. *Id.* at 17, 21.
35. 383 U.S. 541 (1966).
36. *Id.* at 562.
37. 387 U.S. 1, 33 (1967).

RECENT CASES

REAL ESTATE BROKER—FAILURE OF PURCHASER TO CLOSE TITLE AS DEFEATING RIGHT TO COMPENSATION

Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967).

There has been little controversy in recent years as to when a real estate broker has earned a right to his commission. The rule enforced by a vast majority of jurisdictions is:

> Where a real-estate broker procures a customer who is accepted by the principal, and a valid, binding, or enforcible contract is drawn between them, the commission for finding the customer is earned, even though the customer fails or refuses to comply with the contract.[1]

In *Ellsworth Dobbs, Inc. v. Johnson*[2] the New Jersey supreme court broke with almost a century of precedent which sustained this rule[3] and held that the broker was not entitled to his commission unless and until the purchaser consummated the sale by closing title.[4]

The broker in *Dobbs* brought an action on a general listing brokerage contract, the conditions of which he claimed to have performed. The contract provided for payment of one-third of the broker's commission upon closing of title; the balance was due as the vendors received payments from the purchaser under a purchase-money mortgage arrangement.[5] The provisions of the bro-

1. Annot., 74 A.L.R.2d 437, 443 (1960) (The annotation lists cases in 45 jurisdictions sustaining the quoted proposition); *see* RESTATEMENT (SECOND) OF AGENCY § 445 (1958) (especially *comment d*).

2. 50 N.J. 528, 236 A.2d 843 (1967).

3. *See, e.g.*, Blau v. Friedman, 26 N.J. 397, 140 A.2d 193 (1958); Hatch v. Dayton, 130 N.J.L. 425, 33 A.2d 350 (Sup. Ct. 1943); Hinds v. Henry, 36 N.J.L. 328 (Sup. Ct. 1873).

4. 50 N.J. at 551, 236 A.2d at 855.

5. The terms of the contract were quoted in the opinion of the court:

> The commission hereinafter mentioned shall be payable as follows: $5,000.00 when sellers shall have received a total of $25,000.00 on account of the above purchase price ($10,000.00 herewith and $15,000.00 on account of the principal sum of the above mentioned purchase money note and mortgage); an additional $5,000.00 when an additional $25,000.00 shall have been paid on account of the principal sum of purchase money note and mortgage; and the remaining $5,000.00 when an additional $25,000.00 shall have been paid on account of the principal sum of said purchase money note and mortgage. The entire commission of $15,000.00 shall become immediately due and payable upon any

kerage contract were contained in the contract of sale between vendors and purchaser, a contract which the parties entered into despite the previous breach of an oral contract of sale by the purchaser. At the date set for closing title, the purchaser was unable to perform and the vendors granted an extension. Subsequently the vendors sought specific performance and a date was set by the court for closing title. The purchaser appeared at the appointed time claiming he was unsuccessful in obtaining financial backing, and the vendors released him from his obligation.[6]

The *Dobbs* court did not limit its opinion to holding that the particular broker before them was not entitled to a commission. Rather, it set forth a new rule making closing of title a condition precedent to a broker's right to commissions. This condition precedent was implied in law.

Prior to *Dobbs* a New Jersey broker fulfilled his contractual obligation when he tendered to the vendor a ready, willing and able purchaser whom the vendor accepted by entering into a contract of sale. This duty, which is recognized by a majority of states,[7] is based on the theory of unilateral contracts.[8] The vendor, by listing his land with the broker, makes a unilateral offer to the broker. The terms of the offer are that should the broker produce a purchaser who will buy on vendor's terms the vendor will pay the broker a commission.[9] Entry into a contract of sale signifies acceptance by the vendor of the purchaser[10] and evidences the vendor's satisfaction with the broker's performance.[11]

The obligation of the vendor to pay the broker under the majority rule is subject to a number of exceptions. It has been

---

sale or assignment by sellers of said purchase money note and mortgage.

. . . .

And the Seller hereby agrees to pay to Ellsworth Dobbs, Inc. a commission of Six (6) % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable as above mentioned.

50 N.J. at 538-39, 236 A.2d at 848.

6. For discussion of whether release by a vendor of a defaulting purchaser from his obligations under a contract of sale makes the vendor liable to the broker for commissions, *see* Note, *Special Conditions in Real Estate Brokerage Contracts*, 32 COL. L. REV. 1194 (1932); 31 COL. L. REV. 701 (1931); *Annot.*, 74 A.L.R.2d 437, 459-61 (1960).

7. See note 1 *supra*.

8. *See generally* 1 A. CORBIN, CORBIN ON CONTRACTS § 50 (1963).

9. Hinds v. Henry, 36 N.J.L. 328 (Sup. Ct. 1873).

10. Even an oral contract of sale has been deemed sufficient acceptance to require a vendor to pay a brokerage commission. Mercner v. Fay, 71 N.J. Super. 519, 177 A.2d 481 (1962).

11. *See* Brewer v. Williams, 147 Colo. 146, 362 P.2d 1033 (1961); Acheson v. Smith's, Inc., 110 Fla. 240, 148 So. 576 (1933); Bloomberg v. Greylock Broadcasting Co., 342 Mass. 542, 174 N.E.2d 438 (1961); Brindley v. Brook, 10 N.J. Misc. 612, 160 A. 398 (Sup. Ct. 1932); Colvin v. Post Mortgage & Land Co., 255 N.Y. 510, 122 N.E.2d 454 (1919).

held that the broker's tendering of a purchaser is an implied representation that the purchaser is ready, willing and able to buy.[12] If the purchaser subsequently fails to perform, and if the vendor relied on the broker's judgment as to whether the purchaser was ready, willing and able, then there may be no obligation to pay the broker's commission.[13] Closely allied to this implied representation theory is the bad faith exception. Where the broker has breached his fiduciary relation to the vendor and has concealed facts or made false representations which induced the sale, then the vendor has no duty to pay the commission.[14] The broker, who in theory is the agent of the vendor, has the same responsibility to his principal as any other agent. Breach of this responsibility gives the principal the power to terminate the agent's rights under the agency agreement.[15]

A third exception is the failure of the purchaser to close title due to financial inability. Courts recognizing this exception hold that, even though the vendor has accepted the purchaser by entering into a contract of sale, the broker is not entitled to a commission if the purchaser is financially unable to perform.[16] Finally, it has been held that where payments are conditioned on receipt of the purchase price or any part thereof and the purchaser defaults before payment, the broker is not entitled to a commission.[17]

The *Dobbs* court could have retained the majority rule by using one of the exceptions, or a combination of them, to preclude the broker's right to commission. It chose, however, to adopt "a new and more realistic approach to the problem"[18] based on "the fundamental intendment of the parties, owner and broker, i.e., that the owner will sell and the buyer will pay, and the broker will thus earn his commission out of the proceeds."[19] To implement this new approach the court conditioned the broker's right to commission not only on producing a ready, willing, and able buyer whom the purchaser accepts, but also on closing of title.

---

12. Butler v. Baker, 17 R.I. 582, 23 A. 1019 (1892).

13. *Id.*; *accord*, Valois v. Pelletier, 84 R.I. 176, 122 A.2d 148 (1956).

14. *See* Brown v. Coates, 253 F.2d 36 (1958); Carter v. Owens, 58 Fla. 204, 50 So. 641 (1909); Hare v. Bauer, 223 Minn. 285, 26 N.W.2d 359 (1947); R. A. Poff & Co. v. Ottoway, 191 Va. 779, 62 S.E.2d 865 (1951).

15. See RESTATEMENT (SECOND) OF AGENCY §§ 407, 409, 469 (1958).

16. Moore v. Burke, 45 A.2d 285 (Mun. Ct. App. D.C. 1946); *see* 24 TEMP. L.Q. 357 (1951); 74 A.L.R.2d 437, 454-59 (1960) (discussion of cases which both allow and deny recovery by the broker).

17. Sweet v. H.R. Howenstein Co., 73 F.2d 660 (D.C. Cir. 1934); Chambers v. Armour, 76 Fla. 577, 83 So. 721 (1919); Amies v. Wesnofske, 255 N.Y. 156, 174 N.E. 436 (1931); Matuszewski v. Grisius, 118 Pa. Super. 196, 180 A. 130 (1935); *see also* Taylor Real Estate & Ins. Co. v. Greene, 274 Ala. 694, 151 So. 2d 397 (1963).

18. 50 N.J. 528, 547, 236 A.2d 843, 852 (1967).

19. 50 N.J. at 552, 236 A.2d at 855; see Dennis Reed, Ltd. v. Goody, [1950] 2 K.B. 277, 284-85, 1 All E.R. 919, 923 (1950) quoted in *Dobbs*, 50 N.J. at 549-50, 236 A.2d at 853-54.

The *Dobbs* rule is subject to some justifiable criticism.[20] Both the broker and the vendor have practically the same opportunity to investigate the financial ability and the willingness of the purchaser to complete the transaction by closing title. The vendor could investigate the purchaser before entering the contract of sale, and presumably would have no more knowledge of the purchaser than has the broker. Furthermore, when the vendor does enter a contract of sale he gains an enforceable right against the purchaser to have the contract specifically performed.[21] If the vendor correctly assesses the intentions of the purchaser prior to accepting him by entering into a contract of sale, then acquiring a right to specific performance of the contract is equivalent to completing the transaction.

The strengths of the *Dobbs* rule, however, would seem to overshadow its criticism. As noted by the court, it gives effect to the intention of the vendor in placing his property on the market. He is interested in transferring title to the property, not merely obtaining a contract right enforceable through litigation. Closing of title, on the other hand, will in most cases result in complete payment of the purchase price to the vendor, thus guaranteeing satisfaction to both vendor and broker.

The force of this policy is limited because the *Dobbs* rule will not entirely resolve the problem of brokers' commissions. In some instances, as in *Dobbs*, part of the commission is payable on closing of title with the balance due as the vendors are paid installments on a purchase-money mortgage. If the purchaser closes title and subsequently defaults, the question arises as to whether the commission will still be due. The New Jersey court, if it were to apply the *Dobbs* rule strictly, would have to hold the vendor obligated to pay the commission. If, however, the court looks to the reason it gave for the rule—"that the owner will sell and the buyer will pay, and the broker will thus earn his commission out of the proceeds"[22]—then it will undoubtedly find that the vendor is liable to the broker for no more of the commission than has already been paid.[23] Otherwise, the broker might not earn his commission out of the proceeds. As previously indicated, this result has been reached in jurisdictions which follow the majority rule.[24] If the purchase-money mortgage situation is recognized as an exception to the *Dobbs* rule, then the policy advanced by the court in adopting the rule is not crippled.

---

20. *See A Survey of the Law of Real Estate Brokerage Contracts in New England*, 36 BOSTON U.L. REV. 285, 294-98 (1956); 114 U. PA. L. REV. 380 (1966); 24 TEMP. L.Q. 357 (1951).

21. *See, e.g.*, Dillinger v. Ogden, 244 Pa. 20, 90 A. 446 (1914).

22. 50 N.J. at 552, 236 A.2d at 855.

23. Another less desirable alternative would be to require the broker to return to the vendor the commission already received.

24. Taylor Real Estate & Ins. Co. v. Greene, 274 Ala. 694, 151 So. 2d 397 (1963); Chambers v. Armour, 78 Fla. 577, 83 So. 721 (1919); *but see*

A second justification for the new rule is that nonperformance is a business risk to be borne by the broker,[25] just as advertising the property and showing it to potential purchasers are expenses which the broker "risks." The expense of this risk is minimal in terms of cash outlay by the broker, particularly when balanced against his potential gain. The vendor, moreover, contemplated a gain for both parties when he offered the contract to the broker. It does not seem equitable that the broker should gain from a business transaction which does not produce the desired result and that the vendor should pay for that gain.

Finally, adoption of the *Dobbs* rule would have the effect of virtually eliminating bad faith brokers. If the broker suspected that the prospective purchaser might have reservations about entering a contract of sale, or might not be financially able to perform, he would not be anxious to rush a contract of sale. Such a contract would take the land off the market and preclude him from finding a purchaser who would be more likely to complete the transaction.

While the specific holding in *Dobbs* is limited to brokerage contracts which provide for scheduled payment of the broker's commission out of purchase money received, the supreme court announced that it would apply the rule to all brokerage contracts.[26] Indeed, it alerted real estate brokers that this rule would be applied despite contrary provisions in the brokerage contract. To justify its prospective restriction on the freedom to contract, the court relied upon previously developed policy which required it to void grossly unfair contractual obligations if it finds unequal bargaining power between contracting parties:

> Courts and legislatures have grown increasingly sensitive to imposition, conscious or otherwise, on members of the public by persons with whom they deal, who through experience, specialization, licensure, economic strength or position, or membership in associations created for their mutual benefit and education, have acquired such expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage.[27]

That such undue advantage accrued to real estate brokers was not evidenced solely by their experience, specialization, licensure, and

---

McGehee Lumber Co. v. Tomlinson, 66 Fla. 536, 63 So. 919 (1913) (Seller who voluntarily waited to receive his commission from purchase price was allowed to repudiate this agreement and to immediately recover the full commission).

25. 50 N.J. at 548, 236 A.2d at 853.

26. "The basic law governing the owner-broker relationship is declared to be that absent default by the owner, the contract of sale must be performed by the buyer before liability for commission is imposed on the owner." 50 N.J. at 551, 236 A.2d at 855.

27. 50 N.J. at 553, 236 A.2d at 856.

membership in mutual benefit associations, but also by standardized contracts imposing on the vendor liability to pay the broker's commission upon the signing of the contract of sale.

The question arises as to whether such criteria are an adequate basis for restricting the freedom of parties to contracts, and whether their application in the *Dobbs* setting is justified. Experience, licensure, specialization, and membership in mutual benefit organizations characterize not only real estate brokers, but also such professions as law, medicine, accounting, and insurance. Indeed, such criteria would seem to characterize many occupations in today's society. Reliance on them as giving rise to undue bargaining strength of such magnitude as to justify restricting the freedom to contract is therefore surprising.

The court also placed great emphasis on standardized brokerage contracts which contained provisions imposing on the vendor liability to pay brokerage commissions immediately upon entering a contract of sale.[28] Such emphasis hardly seems justified since those provisions merely incorporate the widely accepted common law. It is submitted, therefore, that the criteria used by the court are inadequate to justify a finding of unconscionability in real estate brokerage contracts.

Furthermore, on the facts of *Dobbs*, a finding of unconscionability would clearly be unwarranted. The vendors' lawyers had themselves prepared the contract of sale which the vendors signed.[29] They had ample opportunity to protect their clients' interests. It was their failure, not coercion by the broker, which caused the vendors' loss. Nor does the Uniform Commercial Code section providing for judicial avoidance of unconscionable contract provisions,[30] cited by the court, support its reasoning. The relevant section of the Code enacted by the New Jersey legislature, applies only to the sale of goods.[31] Service contracts are not included within its ambit.

It is suggested, therefore, that while the *Dobbs* rule is desirable, it should not, as a matter of law, limit freedom to contract in a real estate brokerage situation. A real estate broker should earn his commission only upon producing a purchaser who com-

28. Examples of such standardized contracts are contained in the court's opinion, 50 N.J. at 555, 236 A.2d at 857.

29. Brief for Plaintiff-Appellee at 6. Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967).

30. If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of an unconscionable clause as to avoid any unconscionable result.

N.J. REV. STAT. § 12A:2-302(1) (1962).

31. "Unless the context otherwise requires, this Article [from which the quotation in footnote 30, *supra*, is taken] applies to transactions in goods." N.J. REV. STAT. § 12A:2-102 (1962).

pletes the sale by closing title. The parties to the contract should be free, in the absence of a greater showing of unconscionability than that made in *Dobbs*, to limit the application of this rule by special agreement between themselves.

DEAN A. WEIDNER